

**The Chilling Effect and Public Debate**

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## Introduction

The purpose of this paper is to broaden out the discussion; so what I'm going to do is briefly set out how the Strasbourg court has responded to arguments that there can be a chilling effect on news websites over their comment sections. I'm just going to briefly mention three cases on this issue: the *Delfi* case from 2015, the *MTE and Index* case from 2016, and finally, the *Pihl* case delivered just a few weeks ago. I don't want to go in-depth into whether these cases were correctly decided, but instead focus on the arguments on the chilling effect.

## Grand Chamber seeks evidence of a chilling effect

So the first case, of course, is the well-known *Delfi v. Estonia*,<sup>1</sup> which was decided by the 17-judge grand chamber. As many know, Delfi.ee is a news website and it published an article criticising a ferry company operating on the Estonian coast. A number of readers posted comments under the article, targeting the company's owner, which included, "burn in your ship, sick Jew," and "into the oven."<sup>2</sup> Six weeks later, the owner asked Delfi to remove 20 comments, and sought 30,000 euro in damages. Delfi immediately removed the comments, but refused damages. He then sued Delfi, and the Estonian supreme court ultimately upheld his claim, awarding 320 euro. The court found Delfi should have prevented publication of the

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<sup>1</sup> *Delfi AS v Estonia* (2016) 62 E.H.R.R. 6 (Grand Chamber).

<sup>2</sup> *Delfi* (2016) 62 E.H.R.R. 6 at [18].

comments, as they were “clearly unlawful content,” and “obvious to a sensible reader,”<sup>3</sup> and Delfi was thus liable. It did not matter that Delfi had removed the comments when notified.

Now the European Court reviewed the case, and laid down a four-step test for assessing whether imposing liability on Delfi was consistent with Article 10. Now I don’t want to go in-depth into the reasoning, because as is well-known, a majority of the Court found no violation of Article 10. The majority basically classified the comments as “hate speech” and “clearly unlawful content”,<sup>4</sup> and on this basis, said it was okay to impose liability for failing to remove this type of expression “without delay,” and, most important, “even without notice”.<sup>5</sup>

Now, for today’s discussion, what I wanted to focus on was how the Court dealt with Delfi’s argument that imposing liability would have a chilling effect on freedom of expression. Curiously, the majority in *Delfi* nowhere mentions a chilling effect, even though the government addressed the argument,<sup>6</sup> as did the dissent.<sup>7</sup> But while the majority didn’t mention a chilling effect explicitly, it did in a sense address it. The Court examined the broader impact of the supreme court’s judgment, and said that while Estonian courts were imposing liability on other websites, they were not awarding damages.<sup>8</sup> The Court also noted that the number of comments on Delfi were “continuing to increase.”<sup>9</sup> And finally, the

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<sup>3</sup> *Delfi* (2016) 62 E.H.R.R. 6 at [31].

<sup>4</sup> *Delfi* (2016) 62 E.H.R.R. 6 at [141].

<sup>5</sup> *Delfi* (2016) 62 E.H.R.R. 6 at [159].

<sup>6</sup> *Delfi* (2016) 62 E.H.R.R. 6 at [92].

<sup>7</sup> *Delfi* (2016) 62 E.H.R.R. 6 (Joint dissenting opinion of Judges Sajó and Tsotsoria at [20]).

<sup>8</sup> *Delfi* (2016) 62 E.H.R.R. 6 at [160].

<sup>9</sup> *Delfi* (2016) 62 E.H.R.R. 6 at [161].

Court admitted that Delfi had set up a “team of moderators” to monitor comments, but didn’t think this a major consequence to its business model. And of course, the fine was only 320 euro.

So, in fairness to the majority, while it didn’t mention it explicitly, it did in a way engage with the chilling effect argument, considering there was no “evidence” of a chilling effect, as no fines were being imposed and comments were actually increasing. Now importantly judges Sajó and Tsotsoria wrote a scathing dissenting opinion in *Delfi*, and in the next case I wanted to mention, it is important to remember both of these judges were in the seven-judge chamber.

### ***MTE***

The case was called *MTE v. Hungary*, and concerned the Hungarian self-regulatory body for internet content providers. This association published an opinion criticising a property website, and a reader posted a comment saying the property website was a “sly, rubbish, mug company”. Now Index.hu is a news website in Hungary, and it posted a story on the association’s opinion. And under this article, another user commented that “people like this should go and shit a hedgehog.” A week later, the property website sued MTE and Index for defamation, and both actually removed the comments following the initiation of court proceedings. But ultimately, the Hungarian courts held that MTE and Index were liable for defamation, as they had “enabled” publication of the comments. The courts did not impose damages, but ordered both MTE and Index to pay over 111,000 Hungarian forints in fees, and to pay the company’s legal costs.

Now the European Court applied a modified five-step test based on *Delfi*, but unlike *Delfi*, concluded that there had been a violation of Article 10. The Court classified the comments as only “vulgar”, and “free of the pivotal element of hate speech”, and held that imposing liability on MTE and Index, “reflected a notion of liability which effectively precludes the balancing of competing rights”. And crucially, the notice-and-take-down system operated by MTE and Index was a “viable avenue” to protect the company’s reputation. Now what I wanted to highlight for today is how the Court dealt with the chilling effect argument.

The Court held that the “decisive question” was the way in which liability was imposed, and might have “foreseeable negative consequences for the comment environment”, for example by closing the commenting space altogether. These consequences would have a chilling effect on freedom of expression on the Internet,” and particularly for non-commercial websites. The Court also said that while no fines were imposed on MTE and Index, it was worried about “further legal actions” that might result in a damages award. So for the Court in *MTE*, it was not so much concerned about looking for evidence, but instead about future risk, where fines might later be imposed, or comment sections might be closed down altogether. And it contrasts very sharply with the *Delfi* majority’s treatment of the chilling effect, where it was focused on, what it thought, was evidence that comments were increasing, and no fines were being imposed in later cases.

***Pihl***

And this brings me onto the final case I wanted to mention, which was delivered a few weeks ago in *Pihl v. Sweden*. It concerned an association that published a blog in 2011, alleging a 25-year-old man named Rolf Pihl was involved in a Nazi party. A reader commented under the blog saying Pihl was “a real hash-junkie”. A week later, Pihl asked that the blog and comment be removed, and the next day the association removed it, and published a clarification and apology. Nevertheless, Pihl sued the association for defamation. However, the Swedish courts found that while the post was defamatory, there were no legal grounds for holding the association liable for failing to remove the post sooner than it had. Now unlike *Delfi* and *MTE*, Pihl argued before the European Court that his Article 8 right to reputation had been violated by Sweden, in failing to hold the blog liable for defamation.

Now the Court applied the test set out in *MTE*, and held that there was no violation of Article 8. The Court held that although the comment was “offensive”, it was not hate speech, and expecting the association to assume some comments might be in breach of the law would require “excessive and impractical forethought”. The Court, on its own motion, brought up the potential chilling effect, and said that imposing liability “may have negative consequences on the comment-related environment” and thus a chilling effect on freedom of expression via internet, which could be particularly detrimental for a non-commercial website”. So even in a case where neither the applicant, nor the government argued the point, the Court is now taking a potential chilling effect into account on its own accord. This is arguably full circle from *Delfi*, where the Court majority dismissed the chilling effect.

## **Conclusion**

So they're the three cases I wanted to mention today, and I hope you have gotten some sense of how the Court is grappling with the chilling effect argument. It seems to me at least that the Court has moved away from the empirical-type analysis it engaged in in *Delfi*, to a more risk-based approach about the future. I was going to end there, and thanks for listening.